

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Federal Communications Commission
Office of the Secretary

In the Matter of)

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Amendment of Rules Governing)
Procedures to Be Followed When)
Formal Complaints Are Filed)
Against Common Carriers)

92-96
CC Docket No. 92-96
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Federal Communications Commission
Office of the Secretary

Comments of
Continental Mobile Telephone Company, Inc.

Continental Mobile Telephone Company, Inc. ("Continental")^{1/}
respectfully submits these comments with respect to the above-
captioned rulemaking proceeding.

Continental commends the Commission's efforts to streamline
the formal complaint process, particularly its efforts to
facilitate discovery. In Continental's view, existing rules and
procedures enable defendants in formal complaint proceedings to
engender delay by filing repeated procedural motions and
unwarranted objections rather than promptly and responsibly
complying with discovery. In its 1988 revisions to the formal

^{1/} Continental is a reseller of cellular communications service
in the Chicago, Illinois MSA, and is a litigant in a formal
complaint proceeding before the Commission. Accordingly,
Continental is keenly interested in the Commission's efforts to
ensure efficient yet equitable rules governing the formal complaint
process.

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complaint rules, the Commission limited complainants to an initial set of only thirty (30) interrogatories, and required prior Commission consent for any additional discovery requests.^{2/} Although this revision inhibits complainants' ability to conduct adequate discovery, it was reasonable in order to expedite complaint proceedings. Even with this severe limitation on discovery, however, Continental is aware of instances in which parties are using motions and other procedural filings to prevent the beneficial effect of the revision.

The proposals in the Notice of Proposed Rulemaking ("NPRM") will improve the discovery process somewhat. Nevertheless, additional steps, discussed herein, are warranted to ensure that parties, particularly defendants in complaint proceedings, are not able to manipulate the procedures to delay proceedings and thereby frustrate the purposes of Section 208 of the Communications Act of 1934, as amended (the "Act").

Continental fully supports the Commission's proposal to curtail "unnecessary pleadings [which] needlessly prolong the discovery process." NPRM at para. 6. Under existing rules, in addition to filing an answer to a complaint, defendants can file

^{2/} Amendment of Rules Governing Procedures to Be Followed Where Formal Complaints Are Filed Against Common Carriers ("1998 Order"), 3 FCC Rcd 1806, 1811 (1988).

a Motion to Dismiss, then a Motion to Defer Discovery pending resolution of the Motion to Dismiss. This stratagem is intended to shield defendants from legitimate discovery and delay the outcome of a proceeding. To curtail such abuses and make expedited discovery a reality, the Commission should codify its policy, stated in the Report and Order in CC Docket No. 86-498, that "we do not believe that discovery should be held in abeyance pending disposition of procedural matters."^{4/}

The Commission's proposal to limit relevance as a grounds for objecting to interrogatories (NPRM at para. 15) is a significant positive step to improve the discovery process. The generic claim that information sought is "irrelevant" often forces parties to justify even the most innocuous information requests, and possibly be subjected to a protracted pleading cycle before responses to valid interrogatories can be obtained.^{5/} Making refusal to answer

^{4/} 1988 Report and Order, 3 FCC Rcd at 1811 (1988). The Commission made this assertion in rejecting Ameritech Corporation's request that discovery be delayed until after "all procedural matters, such as motions to dismiss, have been resolved." Id. at 1807 (emphasis added). Appendix 1 hereto contains language codifying this proposed revision in Section 1.729(d) of the Rules.

^{5/} The Commission's proposal to adopt specific rules for preserving confidentiality of discoverable information is also a positive step. Continental believes that a mechanism for protecting confidential information will drastically limit parties' ability to elude or unreasonably delay discovery requests under the guise of a claim that the information sought is proprietary.

an interrogatory constitute an admission for purposes of resolving the complaint will place a deserved burden on uncooperative parties, and should significantly reduce the number of motions to compel in complaint proceedings.

Regarding the Commission's proposal to postpone discovery with respect to damages until after the initial determination of liability has been reached, Continental doubts that the proposal will have the desired effect of expediency. A defendant, having been adjudicated to be liable, has an clear incentive to withhold information and delay the proceeding. Should the Commission elect to defer discovery with respect to damages until after the issue of liability is resolved, it must remove limitations on interrogatories and other discovery requests pertaining to damages, and provide additional restrictions on defendants who are found liable. First, following issuance of an order establishing liability, no further staff order should be required before discovery with respect to damages is permitted. Second, the thirty (30) interrogatory limit should be enforced independent of interrogatories pertaining to damages. Third, defendants who are found liable should not be permitted to raise objections such as relevancy and scope.

The proposal (NPRM at n.9) to condition all discovery on the issuance of a staff order will be counterproductive to the

Commission's stated intent in adopting the NPRM and should be rejected outright. If such a proposal were adopted, parties seeking to avoid or delay responding to discovery requests will simply focus their efforts at opposing all motions seeking issuance of the requisite staff order. As discussed above, the Commission has already severely limited complainants' ability to conduct meaningful discovery. The Commission does not need yet another limitation on complainants' ability to discover relevant facts.^{5/} Instead, the Commission should rely on its existing and proposed rules, and increase its use of status conferences, including telephonic conferences, to limit irrelevant or unduly burdensome discovery requests.

Similarly, the Commission's proposal to have answers to interrogatories and other discovery documents not be filed with the Commission is problematic. Absent some form of Commission scrutiny, this proposal may enable parties to be uncooperative in responding to discovery requests. If the Commission determines that answers to interrogatories and other discovery documents need not be filed with the Commission, at a minimum it should provide

^{5/} To the extent that such a proposal is geared towards reducing the number of frivolous complaints-- an entirely justifiable objective-- Continental submits that a more efficient and effective remedy would be to increase the filing fees associated with formal complaints under Section 1.1105(1)(c).

for the filing of a certification that the discovery requests have been answered and, where not answered, an explanation for this refusal. This procedure will enable the Commission to act promptly on motions to compel and to take other appropriate action where a party seeks to avoid cooperation with discovery requests.

In sum, Continental commends the Commission on the intent of its NPRM, and supports most of the proposals therein. The Commission should be aware, however, that often the party responding to discovery-- rather than the discovery proponent-- is causing the obstruction and delay in complaint proceedings. The modifications suggested above, in conjunction with many proposals in the NPRM, will encourage all parties to complaint proceedings to complete discovery in an expeditious, efficient manner.

Respectfully submitted,

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APPENDIX 1

Revision to Proposed Rule 1.729(d)

§1.729 Interrogatories to parties.

* * *

(d) Parties on whom interrogatories are served shall respond without waiting to be ordered to do so by the Commission. Parties shall respond notwithstanding the pendency of any procedural matters, including, but not limited to motions to dismiss. Each interrogatory shall be answered separately and fully in writing under oath or affirmation, unless it is objected to, in which event the reasons for objection shall be submitted in accordance with subsection (c), above. The answers shall be signed by the person making them. The party on whom the interrogatories were served shall serve a copy of the answers and objections, if any, within 20 days after service of the interrogatories. Failure to answer or an evasive answer will be deemed an admission for purposes of resolving the complaint.